No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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Dated: March 25, 1963

McCORMICK & HENDERSON INC., CHICAGO, ILL.

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 747

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

Appellant, Board of Trade of the City of Chicago (Board of Trade) submits this brief in opposition to the motions to affirm filed by The New York Central Railroad Company (NYC) and the McNabb Grain Company, *et al.*, (McNabb), intervening defendants in the court below. Neither the United States nor the Interstate Commerce Commission has filed a motion to affirm.

This appeal raises the following question:

> May the Interstate Commerce Commission, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the

long-and-short-haul requirement of section 4 of the Interstate Commerce Act, without considering and determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities?

That part of the argument in the motion to affirm filed by the NYC which pertains to this appeal is found on pages 10-16 of the motion. Substantially all of the arguments there made were anticipated in appellant's Jurisdictional Statement. However, a few brief additional comments are warranted.

The principal thrust of the NYC's argument that the question presented is not substantial is that this Court decided in *United States* v. *Merchants & M. Traffic Asso.*, (the *Sacramento* case) 242 U.S. 178 (1916), that "the Commission is not required to make a final determination in respect to the lawfulness of the rates under other sections of the Act in a hearing limited, as this one was, to the railroads' fourth section application." (NYC motion, pp. 10-11) This Court, we submit, did not make any such holding in the *Sacramento* case, nor can such a result be reasonably inferred from anything which this Court said in that case. The argument of the NYC that the hearing in the instant case was "limited . . . to the railroads' fourth section application" begs the question. At no time did the Commission, in the instant case, limit the hearing on "permanent" fourth-section relief to exclude the section 3(1) issue. On the contrary, consistent with its past practice and decisions, the Commission received the Board of Trade's evidence on the section 3(1) issue. The notice of hearing in this proceeding (NYC motion, App. A) did not limit the hearing. The earlier notices and orders in the suspension and "temporary" authority matters, to which the NYC refers (App. B), suggested that

a complaint might be filed to test the lawfulness of the rates. In accordance with past Commission practice, such a complaint became unnecessary when the fourth-section application was assigned for hearing.

We submit that a hearing on such a fourth-section application cannot be "limited" to exclude consideration of legal issues which must be passed upon to determine whether the rates in issue are consistent with all applicable sections of the Act. The rule of the *Sacramento* case is not to the contrary. Its holding is that one who is not a party to the hearing before the Commission is not entitled to a rehearing to present contentions of unlawfulness under sections 2 and 3, but that, in such circumstances, the appropriate remedy is a proceeding under section 13 or 15 of the Act.

The NYC also argues that *Intermountain Rate Cases*, 234 U.S. 476 (1914), means only that an intermediate shipper, and not a competing shipper, is entitled to raise section 2 and 3 issues. There is no such limitation in the Court's language and, we submit, no such limitation can be read into the language.

The NYC attempts to explain away the long line of cases in which the Commission said that it would not authorize fourth-section-departure rates which would violate other sections of the Act by dividing such cases into various categories. By making such a separation, the NYC simply reinforces our contention that the Commission has steadfastly followed the *Intermountain Rate Cases* in all categories of cases.

The only aberration in the courts or the Commission is the dictum in *Seatrain Lines* v. *United States*, 168 F. Supp. 819, 824, (S.D. N.Y., 1958) which, as pointed out in our Jurisdictional Statement (p. 15), is plainly wrong. It is

that decision which appears to have led the Commission and the lower court to depart from the Commission's long-standing interpretation of section 4.[1] It is important to the Commission and parties appearing before it to have the doubt created by *Seatrain Lines* laid to rest. This need, standing alone, shows that the question raised by this appeal is substantial, requiring plenary consideration by this Court.

The National Transportation Policy requires the maintenance of "reasonable charges for transportation services, without unjust discriminations, undue preferences, or advantages." The NYC argues that neither the Commission nor the court below held that the Commission is excused from taking cognizance of the National Transportation Policy. But the Commission's failure to consider the evidence of the Board of Trade showing unjust discrimination and undue preference and prejudice is inconsistent with the injunction of the National Transportation Policy, which requires that "all" provisions of the Act shall be administered and enforced with a view to carrying out that policy.

Finally, the NYC argues that appellant's reference to other rate adjustments which have been precipitated by the Kankakee adjustment is irrelevant to the question presented because those proceedings are investigations instituted pursuant to section 15(7) of the Act "in which all questions as to the lawfulness of the rates there in-

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[1] Two other cases cited by the New York Central, *Koppers Company v. United States*, 132 F. Supp. 159 (W.D. Pa., 1955) and *Florida Citrus Commission v. United States*, 144 F. Supp. 517 (N.D. Fla., 1956) are general revenue increase cases in which the courts did not consider the section 4 question here raised. These cases simply hold that the Commission need not examine the lawfulness of a particular rate when it is determining whether the whole of the rate structure may be increased.

volved will be determined." (NYC motion, p. 16) This misses the point, as does a somewhat similar argument in the McNabb motion (p. 16). Appellant did not refer to those cases because of any similarity of legal issues. Reference was made to those proceedings to illustrate the far-reaching effect which the Kankakee rates, here in issue, have had on the rate structure as a whole. Appellees neither do, nor can, deny that fact.

The McNabb motion does not deal with the issue now before the Court, *i.e.*, the substantiality and importance of the question presented, but is simply an attempt to argue the merits of whether the evidence of the Board of Trade proved that the involved rates cause unlawful discrimination and prejudice against Chicago. This is a question which is not, and will not be, before the Court in this appeal; the Commission never reached the determination of that factual question since it held that, in this case, it need not determine whether the rates were unduly prejudicial to Chicago in violation of section 3 of the Act. That the rates do discriminate against Chicago, however, is well shown, among other things, by the statement on page 7 of the McNabb motion that, out of 1800 cars moving off the Kankakee Belt line, only 31 moved to, or via, Chicago.[2]

[2] The period covered by these figures, which is not stated in the motion, was the first six months of 1957, which was after the 5-cent rate became effective. During the same period the previous year, before the rates became effective, a substantially greater number of cars moved by rail to Chicago from Kankakee Belt elevators, although the total number of cars shipped from Belt elevators was smaller.

The McNabb motion contains certain errors of fact and erroneous and unwarranted characterizations of the evidence.[3] For example, it is stated (p. 12):

> Since the rate via Chicago is the same as via Kankakee, it is obvious that Chicago is in the same position to offer 18 cents more for corn, based on the 5-cent proportional, because it enters into the make-up of the through charges in the same manner.

As pointed out in our Jurisdictional Statement (p. 8), one of the principal contentions of the Board of Trade is that the rates involved, being applicable only on corn products and not on whole corn, discriminate against the Chicago corn merchants, and prevent them from buying corn originating on the Kankakee Belt in competition with the Kankakee processor. It is not true that the Chicago corn merchant is in the same position as the Kankakee processor to offer 18 cents more for the corn. When the Kankakee processor buys corn off the Kankakee Belt, he knows he will receive a credit of 18 cents when the corn is milled

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[3] The NYC motion (p. 8) also erroneously states that *corn* moving on the Kankakee combination "can be stored in transit or milled in transit at Chicago." Corn cannot be stored in transit and reshipped to destinations in the East as whole corn. It can be stored in transit only if it is also milled in transit prior to destination. In other words, as stated in the Jurisdictional Statement (p. 7), the Kankakee combination applies only on corn products; it does not apply on whole corn.

In referring to the rate charts on page 6 of the Jurisdictional Statement, the NYC states (p. 7) that the NYC had no movement from Streator during the years 1954-1956. There is an apparent conflict in the record as to whether corn moved from Streator to Chicago during 1954-1956. Whether or not corn moved to Chicago from Streator is of no moment here, since Streator was selected only as a convenient point to illustrate the rate situation before and after the 5-cent rate became effective. The same rate discrimination is illustrated by comparisons of any one of the Belt stations from which the record shows, without contradiction, substantial movements of corn to Chicago prior to the 5-cent rate.

into products and reshipped to the East.[4] Except in unusual circumstances, the Chicago merchant cannot buy the corn on such a basis since, when he buys the corn, he does not know where his outlet will be.

McNabb's argument that there is no discrimination against Chicago because the Kankakee combinations on corn products apply via Chicago is covered in appellant's Jurisdictional Statement (pp. 8-9).

CONCLUSION

For the reasons stated herein and in appellant's Jurisdictional Statement, it is submitted that the question presented by this appeal is substantial and important, and that the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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[4] The statement on page 11 of McNabb's motion that no shipper receives a credit on any part of the inbound rate is in error, as is shown by the NYC motion (p. 7), by appellant's Jurisdictional Statement (p. 7), and by statements in the McNabb motion itself.